WYOMING
GAME AND FISH DEPARTMENT
Dave Freudenthal, Governor
Terry Cleveland, Director
"Conserving Wildlife - Serving People"

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WER 9822
National Environmental Policy Act
Task Force on Improvement and Update
Initial Findings and Draft Recommendations

NEPA Draft Report Comments
C/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, D.C.

To Whom It May Concern:

The staff of the Wyoming Game and Fish Department has reviewed the initial findings and draft recommendations of the task force on improvements and updates for the National Environmental Policy Act (NEPA). We offer the following comments.

These comments were prepared and reviewed by senior agency biologists who each have more than 25 years of experience in reviewing NEPA documents, and have been witness to much of NEPA's evolution since the earliest years of the Act's implementation. Our comments and recommendations focus on the nine themes in the report:

- What does NEPA mean?
- Impacts of changing NEPA
- Impacts/consequences of litigation under NEPA
- Coordination among federal, tribal, state and local entities
- Interaction (duplication) of NEPA with other substantive laws
- Delays resulting from the NEPA process
- Additional costs associated with NEPA compliance
- Public participation
- Adequacy of agency resources to effectively implement NEPA

Several of the recommendations appear to be attempts to rectify issues by establishing sideboards to constrain NEPA implementation, without addressing how the suggested changes actually improve the quality of NEPA analyses and decisions, or foster the attainment of national environmental goals. For example, there are suggestions to strictly limit the length of NEPA documents, the time periods for developing NEPA documents and conducting reviews, and the time period for filing litigation. It is unclear how constraining the timeframes of a NEPA

process or limiting the volume of NEPA a document will help achieve the fundamental directives of NEPA:

> " The Congress … declares that it is the continuing policy of the Federal government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." and "The Congress authorizes and directs that, to the fullest extent possible … all agencies of the Federal Government shall … include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
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> (i) The environmental impact of the proposed action;
> (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented;
> (iii) Alternatives to the proposed action;
> (iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
> (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

We suggest that Congress limit its use of the term "improve" to those cases in which the changes actually foster [improve] the original purpose and intent of the legislation under review, and not cases in which the changes serve other interests. A change that compromises the integrity and ability of NEPA to attain national environmental goals is not an "improvement" of NEPA.

The majority of recommendations seem to be unnecessary because existing provisions of the Council on Environmental Quality (CEQ) regulations adequately address the issues raised. In some cases, it is possible federal agencies are not implementing the provisions effectively or in accordance with the original intent. The CEQ should notify the agencies of compliance or administrative problems and recommend the necessary performance adjustments to correct them, as this is part of the Council's existing oversight function. However, amendments to NEPA are unnecessary and in many cases would be contrary to the Act's original purpose and intent.

1) What is NEPA's Intent? Conflicting testimonies assert NEPA is procedural and really offers no additional protection above existing environmental laws; NEPA has become a tool for obstructing controversial projects; NEPA is an effective means of ensuring accountability by federal managers; NEPA is an effective environmental protection statute; and NEPA's purpose is to protect and empower the public.

Section 105 of NEPA states, "The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies." This means the requirements of NEPA are in addition to the requirements of other, environmental laws and authorities. Section 102 sets forth the Congressional directives of NEPA, which state, "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this act."

In addition, 40 CFR 1500.6 states, "Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act." §1501(a) states in part, "The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101."

Response: The Act mandates a substantive result and not just a procedure. Agencies that fail to interpret their existing statutes and authorities, or to revise their policies in light of the Act's national environmental goals, contravene the Act's mandates.

We note that the procedural aspects of NEPA are important. Provisions of Section 102 and CEQ regulations establish the principals and criteria for public disclosure of agency decisions, including compliance with other environmental policies, laws, and regulations. This public disclosure elevates agency accountability and keeps influences of special interest lobbying and agency biases from "flying beneath the radar." In addition, public disclosure and interagency consultation requirements enable outside individuals and institutions with special expertise to review scientific data and analyses and render their independent interpretations.

The contention NEPA is being exercised principally as a tool to obstruct controversial projects is inaccurate. This is not the purpose of NEPA. As pointed out by the report, 99.97% of NEPA actions are successfully completed without an injunction and only about 0.2% of the 50,000 Environmental Impact Statements (EIS) filed annually result in litigation. To be successful, the litigation must be founded upon a flawed analysis or procedural violation.

2) Reasons and concerns about modifying NEPA. Many of the suggested changes add additional constraints to the NEPA process. However, this simplistic approach (treating symptoms) does not address how the constraints would actually improve the quality of NEPA analyses and decisions. For example, there are suggestions to strictly limit the length of NEPA documents, the time period to complete the NEPA process, and the deadline for filing litigation. It is unclear how constraining the timeframes under the NEPA process or limiting the volume of NEPA documents will facilitate the fundamental purpose and intent of NEPA. For this reason, we support the concept that a "burden of proof" must be met before changes are considered. Overall, NEPA has been an effective federal law and the nation's

foremost environmental conservation tool for over 35 years. Any potential changes must be solemnly weighed in light of the original purpose and Congressional intent of NEPA. NEPA was crafted to ensure the potential environmental impacts of agency actions receive adequate scientific and technical scrutiny to determine whether and to what extent the actions should be carried out, and to assure alternatives that reduce or eliminate impacts are appropriately considered.

The standard for "burden of proof" must be a demonstration, based on empirical data that: 1) the problem exists and is a substantial impediment to the original purpose and intent of NEPA; 2) the change(s) proposed will resolve the problem without compromising the effectiveness of procedures under NEPA and the CEQ regulations; and 3) the change(s) proposed will ultimately improve the quality of decisions made under NEPA and the CEQ regulations.

We see little necessity to amend the Act itself, or of codifying CEQ regulations into the Act. Congressional statute (the Act) establishes the environmental principals and framework under which federal agency decisions are to be analyzed and ultimately carried out. Codifying additional constraints into the Act entails several risks including failure to anticipate specific circumstances that cannot be addressed properly or effectively if the constraints should become law, and the loss of regulatory flexibility and agency discretion to address unique circumstances or to interpret provisions of the Act as conditions and circumstances evolve. If changes or clarifications are needed, they should be outlined in CEQ regulations or better yet, in agency policies implementing those regulations. Many of the issues raised by comments are adequately covered by existing CEQ regulations, and the problems that arise are generally a consequence of agencies' failure to properly implement the regulations, and of project applicants' failure to understand and appropriately utilize existing regulatory provisions. Additional regulations are not the solution.

3) Times have changed since NEPA was enacted. In our experience, most resource agencies are disinclined to require other than minimal compliance with the statutory authority they have and tend to accommodate politically powerful influences to the maximum extent their authorities allow.

4) Definition of "major federal action." Several comments assert federal agencies are treating an excessive number of actions as "major federal actions" and suggest the term should be more specifically defined. CEQ regulations (40 CFR 1508.18) define "major federal action" to include actions with effects that may be major and which are potentially subject to federal control and responsibility.

Response: The existing definition is specific and unambiguous without risking the exclusion of actions having potentially significant impacts. The scope and intensity of the possible impact are the determining factors. Under the existing definition, agencies of necessity must exercise discretion in determining whether actions potentially have significant impacts.

Major agency actions can and do include actions such as land use plans, promulgation of policies and regulations, and specific construction or resource extraction projects in localized areas. We see no problem with the existing agency implementation of "major federal action."

5) Litigation. Litigation (judicial review) is the final level of independent scrutiny available under [or outside of] NEPA to assure federal agency decisions are not based on biased or flawed reasoning, and to assure the procedural provisions of NEPA are not violated. As such, litigation serves an essential, highly beneficial public purpose. The statistics presented in the report confirm litigation has not been pervasive – only 0.2% of EISs are litigated and only 0.03% of NEPA actions are enjoined by court orders. A 0.2% litigation rate does not seem excessive. The solution offered is to require fewer EISs by redefining "major federal action," so fewer lawsuits can be filed. It does not appear this would improve NEPA's effectiveness in fulfilling national environmental objectives.

   Litigation has forced many agencies to improve the quality of NEPA analyses and has led to better procedural compliance. Litigation has also played an essential role in helping to better define agency standards of performance.

6) Federal, tribal, state, and local entities. Comments point to the overriding theme that additional delays may arise from conflicts among non-federal agencies and other entities during the coordination process. The purpose of coordination is to provide a means by which non-federal entities can express their positions, issues and concerns, and to resolve conflicts if there are any. This coordination is an essential and valuable part of the NEPA process.

7) NEPA and other substantive laws. Several comments assert NEPA analyses can be duplicative or redundant to requirements of other environmental laws. NEPA could be amended to recognize the "functional equivalence doctrine," which would exempt federal agencies from complying with NEPA requirements, provided the agencies utilize other "substantive and procedural standards that ensure "full and adequate consideration of environmental issues."

   Response: We disagree with this suggested change. CEQ regulations, in several places, already address potentially overlapping processes (we avoid using the term "duplicative" for reasons described later). 40 CFR 1500.2(c) requires federal agencies to, "Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively." §1500.4(k) requires Federal agencies to reduce paperwork by, "Integrating NEPA requirements with other environmental review and consultation requirements." §1500.5(h) requires, "Agencies shall reduce delay by eliminating duplication with State and local procedures by providing for joint preparation (§1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§1606.3)." §1501.2 requires, "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and

decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." §1502.25(a) requires, "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. Sec. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. Sec. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), and other environmental review laws and executive orders." [and] §1506.2(b) states, "Agencies shall cooperate with State and local authorities to the fullest extent possible to reduce duplication between NEPA and State and local requirements … Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include: (1) Joint planning processes; (2) Joint environmental research and studies; (3) Joint public hearings (except where otherwise provided by statute); and (4) Joint environmental assessments."

These provisions make it clear that Federal agencies are already directed to minimize and avoid duplicative processes. It is for this reason that many agency plans (i.e., resource management plans, forest management plans, oil and gas field development plans, Fish and Wildlife Coordination Act Reports) are prepared in the framework of an EIS or EA to concurrently fulfill the requirements of NEPA and other environmental regulations or processes. If an agency is not doing this, then it may be in violation of existing procedural requirements in the CEQ regulations.

NEPA is supplementary to existing agency authorizations, regulations, policies and procedures. The NEPA process adds necessary public disclosure, coordination, data adequacy, analytical, administrative and judicial review requirements, which are not fully embodied by or developed within *any other* federal environmental legislation. Also, there is the requirement to analyze the additive and synergistic effects of the proposed action when combined with other past, present and reasonably foreseeable actions. Adequate public disclosure and an analytical framework that considers alternatives to reduce environmental degradation are crucial concepts of NEPA and reasons for its existence. Thus, the supplementary requirements of NEPA help to assure several of the abuses discussed Comment 3 and elsewhere are avoided during the implementation of other agency programs and environmental regulations.

8) Delays to the NEPA Process. The theme of delays is the basis for most comments and suggestions in other sections of the Task Force report. However, the following specific issues are discussed here: the length of NEPA documents, the lack of a definitive timeframe for completion of the NEPA process, a purported lack of alternative procedures to expedite projects, reopening the NEPA process after it is completed (i.e., issuance of supplemental EAs or EISs), and an unnecessary number of alternatives considered in the analysis.

All of these issues are satisfactorily addressed within the existing CEQ regulations, which establish procedural sideboards while granting agencies sufficient flexibility and discretion to work effectively.

Page limits. A number of references in 50 CFR 1500.4 attempts to limit the length of documents (§1500.4, 1502.2(a), 1502(c), 1502.13, 1502.15).

It should be noted that these page limits pertain only to the text portions of the sections that are referenced, and not to other sections, data appendices, tables, maps, or figures. It is somewhat misleading to cite the total length of an EIS (e.g., the average EIS was 742 pages in 2000) without looking at the actual length of the sections to which the CEQ recommendations are directed. When one considers the range of resource interests that must potentially be analyzed under a given federal action, only a cursory and inadequate analysis may be possible in some cases if the suggested page limits are rigorously followed. The need for agency discretion was recognized in the original language by including the qualifier, "normally." Simply truncating an EIS by limiting page length does not contribute to, and will very likely detract from, fundamental objectives of NEPA, which are to foster high quality environmental analyses and excellent decisions. NEPA and the CEQ regulations encourage agencies to write concise documents without sacrificing quality and content. Most of the time it is in the agencies' interest to do exactly this. Merely limiting page numbers is treating a symptom, rather than offering a solution. NEPA documents need to be as long as necessary to meet the purpose and intent of the Act, and as short as they can be without compromising their integrity and value as a decision support document.

The CEQ regulations, while encouraging agencies to set time limits, also recognize the need for discretion and flexibility to meet the purposes of NEPA and other essential considerations of national policy. §1501.8(b)(1)(i-vii) lists several considerations an agency may make in prescribing appropriate time limits. As with page limits, merely imposing a universal time limit is the treatment of a symptom, rather than a solution. Agencies must take as long as necessary to prepare NEPA documents such that they meet the purpose and intent of the Act.

A number of provisions include sufficient direction and allowance to identify projects that qualify for exceptions under NEPA procedures, and to expedite agency decisions for specific classes of projects that typically do not have significant, adverse effects on the human environment (40CFR 1500.4, 1501.4, 1507.3, 1501.4, 1506.11, 1500.6). Adding more specific criteria will pose the risk of excluding projects, which could have significant adverse effects.

Supplemental NEPA documents (reopening the NEPA process). Supplemental EAs or EISs are typically done when the scope of a propose action changes such that it exceeds the levels that were analyzed (authorized) in the original NEPA document. The primary purpose of NEPA is to serve the national public's interest in protecting environmental resources. If a project is approved, but subsequent information indicates the environmental impacts are likely to exceed what was covered by the original analysis, then the public's interest must take priority over the project.

Excessive alternatives in the analysis. CEQ regulations clearly require that alternatives must be "reasonable" to be considered in detail, which means they must be technically and economically feasible. Typically, agencies analyze a "preferred alternative," a "no-action alternative," and additional alternatives identified during the scoping process to address preferences or conflicting interests of various stakeholders.

Some commenters suggest mitigation actions found in the proposed alternatives should be mandatory. We believe the existing agency mandates under NEPA and the CEQ regulations clearly establish that the impacts of any alternative selected must be mitigated to the maximum extent required or allowed by whatever authorizations, laws or policies govern the agency action [§§1500.2(a) and (f), 1500.6, 1502.14(f), 1502.17(h), 1505.2(c), 1508.20]. Thus, adequate mitigation must be included in each alternative other than the no-action alternative, and must be mandatory. Adding a requirement to mitigate adverse effects of all agency actions, regardless whether the agency's existing authorities require or allow it , could be considered.

9) NEPA compliance costs.

Response: It is a misconstruction to assert that costs reflect the amount of information required to address litigation. Costs reflect the amount of information necessary to bring NEPA documents into compliance, and when they are not in compliance, additional costs may be incurred in defending against litigation.

10) Public participation.

Forcibly truncating documents does not necessarily improve their quality, and carries a serious risk of compromising their integrity. The CEQ regulations adequately speak to the topic of document length (§§1500.4, 1502.2(a), (c), 1502.7, §1502.13, §1502.15). Agencies should be encouraged to review their procedures to assure their statements include sufficient detail to comply with the purpose and intent of NEPA and the CEQ regulations, but are not longer than necessary.

11) Do Federal agencies have enough resources? We believe federal agencies are underfunded and understaffed, and because of this, there are significant delays in the NEPA process and documents that make them more vulnerable to litigation. By its own admission, the BLM does not have sufficient staff or funding to collect basic resource information, to monitor resource conditions, or to follow through with monitoring and mitigation commitments in NEPA documents.

The dearth of resource data (i.e., good science) is a major impediment to drafting unassailable NEPA documents. High quality, *empirical* data are essential to properly describe the existing environment, analyze the impacts of each alternative, and prescribe appropriate mitigation. BLM's shortage of personnel and funding create an inability to satisfactorily monitor resource conditions, enforce reclamation standards, or assure

mitigation is carried out, which in turn make the agency reluctant to make such commitments within NEPA documents. Poor and inadequate data are often a cause for litigation.

12) Recommendation 1.1: Amend NEPA to define "major federal action." We oppose amending NEPA to define "major federal action." The term is adequately defined by the CEQ regulations at 40 CFR 1508.18. The existing definition is preferable to the concepts suggested for an alternative definition. These concepts (e.g., substantial planning, time, resources, or expenditures) are not necessarily related to the fundamental basis for defining a major action, which is an action potentially having significant impacts. In addition, the concepts would constrain the definition such that some actions with significant, adverse effects are excluded from consideration as "major federal actions." Finally, the modifier "substantial" imparts even greater ambiguity than the criteria of the existing definition. The proponents for redefining, "major federal action" have not explained how this change will improve the quality of NEPA analyses and decisions or contribute to the attainment of national environmental goals.

13) Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents. We oppose amending NEPA to define mandatory time limits. Adequate provisions to expedite NEPA processing are already contained in the CEQ regulations at §§1500.5(e), 1501.7(b)(2), 1501.8, and 1506.10.

14) Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). These concepts are appropriately addressed by the CEQ regulations at §§ 1501.3, 1501.4, 1507.2(c), and 1507.3(b). The decision whether to prepare an EIS is based upon the definition of "major federal action," (§1508.18), which also relates to "significantly" (§1508.28). These definitions clearly establish the criteria, including context and intensity, which are to be considered in determining if an action is likely to have significant environmental effects and is therefore a major federal action. Attempting to bypass these criteria by directly defining when to use a CE, EA, or EIS contradicts the purpose and intent of NEPA. The proponents have not explained how this change will improve the quality of NEPA analyses and decisions or contribute to the attainment of national environmental goals. We oppose this recommendation.

15) Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. We oppose the proposal to codify 40 CFR 1502.9(c)(1)(i) and (ii) by incorporating the existing provisions for when to prepare supplemental NEPA documents into NEPA itself. Codifying the regulations does not make them more effective or obligatory. It only makes them more difficult to change, which is not necessarily good.

16) Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments. Lead agencies generally give the appropriate weight to localized comments and this varies with the type of action. When proposed actions may impact important national resources, for example threatened or endangered species, historic landmarks, national parks,

or significant cultural and scenic resources, it is not appropriate to give localized comments more weight than national comments. On the other hand, localized comments should receive more weight with respect to actions that primarily impact resources of local or regional significance, for example municipalities, local recreation opportunities, or resident wildlife. This is not something that can be addressed by a one-size-fits-all rule. In addition, localized comments are often driven by economic motivations, for example maximizing opportunities for resource development, which may be inconsistent with national environmental objectives. We support the status quo (i.e., no change), because existing agency policy has worked reasonably well in most cases.

17) Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. The CEQ regulations provide agencies adequate direction regarding the size of NEPA documents, while affording an appropriate level of discretion to incorporate the materials necessary to achieve compliance, assure the professional integrity and scientific accuracy of the analysis, and develop a meaningful and useful decision support document (§§1500.4, 1502.2(a), 1502.2(c), 1502.7, 1502.10(d), 1502.13, 1502.15). The original page limits recommended by CEQ were optimistic and insufficient in many cases to achieve the purpose and intent of NEPA.

18) Recommendation 3.1: Amend NEPA to grant tribal, state and local stakeholders cooperating agency status. This proposal would result in a much more complex, controversial and protracted NEPA process, which contradicts most other recommendations in this report. Most "local stakeholders" do not have the resources or expertise to fulfill the responsibilities of a cooperating agency set forth under 40 CFR 1501.6. It is unnecessary to amend NEPA to grant cooperating agency status to the entities mentioned. Under the existing regulations, a State, tribe or nonfederal agency can request cooperating agency status and, if the action has truly major ramifications pertinent to the State's, tribe's or nonfederal agency's interests, it is unlikely such a request would be denied. The major functions and roles of a cooperating agency are to assist in preparing environmental analyses and to lend special expertise to the process. Contrary to what many believe, the purpose of cooperating agency status is not to give some entities an inside track to assert greater influence over the outcome of the process. The major purpose is for cooperators to provide expertise that the lead agency does not have, and to provide input for matters where the cooperators have legal jurisdiction. The lead agency should retain its discretion to determine which entities can best contribute in the role of a cooperating agency, while eliminating entities whose primary motivations may be political or disruptive. The normal public review process (§1501.7, 1502.19, and 1503) affords other entities ample opportunity to participate in the NEPA process and express their views. We support the status quo (no change).

19) Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. Such an allowance is adequately addressed by existing CEQ regulations at §§1500.2(c), 1500.4(k), 1500.5(h), 1501.2, 1502.25(a), 1506.2, and 1506.3. If other environmental review processes are adequate, agencies are currently directed to reduce duplication and overlap by integrating

them into the NEPA process. To assure all NEPA and CEQ provisions are fulfilled, the lead agency must be permitted to integrate relevant and compliant portions of other analyses into the NEPA process, as provided by existing CEQ regulations. Finally, the NEPA public review process pertains to federal agency actions affecting national public interests. The public comment and outreach procedures of State environmental review processes are unlikely to engage the national public, and therefore do not fulfill the public review requirements of NEPA. The proponents of substituting state environmental review procedures have not explained how this change is an improvement over the existing CEQ regulations, or how it enhances the quality of NEPA analyses and decisions. We support the status quo (no change).

20) Recommendation 4.1: Amend NEPA to create a citizen suit provision. The proponents of this suggestion have not demonstrated how their recommendations will improve the quality of NEPA analyses and decisions, or contribute to the attainment of national environmental goals. Therefore, we oppose the suggested changes.

21) Recommendation 4.2: Amend NEPA to require that agencies "pre-clear" projects. This recommendation has merit, however, revising the CEQ regulation may be a better way to require the CEQ to monitor court decisions that affect procedural aspects of NEPA, and advise appropriate federal agencies of their applicability. In most cases, federal agencies are made aware of these decisions through their NEPA training programs or legal council, and agency policies and handbooks are revised accordingly. We support making this change in the CEQ regulations and not the Act.

22) Recommendation 5.1: The CEQ regulations adequately address the topic of "reasonable," which includes economical and technological feasibility. We oppose the suggested change because it would serve to constrain the alternatives in a way that is contradictory to national environmental goals of NEPA.

23) Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project. The CEQ regulations already require an adequate discussion of the impacts of the "no-action alternative." We disagree it is appropriate to always require an "extensive discussion" of the no action alternative, because other alternatives are not given this level of scrutiny when they are not reasonable. This would also serve to unnecessarily lengthen NEPA documents, which is contradictory to the intent of most comments.

24) Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory. NEPA and the CEQ regulations effectively require that agencies must assure adverse impacts are mitigated to the extent practicable within their existing authorities.

This mandate of NEPA seems to have become obfuscated in the academic discussion over what NEPA means. We see value in clarifying what is actually required however, simply making mitigation proposals mandatory could have the unintended consequence of making

agencies and project proponents increasingly reluctant to discuss actual mitigation in NEPA documents. Thus, the CEQ regulations should consider providing the following additional clarity: *"Agencies shall require mitigation measures sufficient to offset adverse environmental impacts of any action that is approved and the mitigation shall be mandatory. If adverse impacts of an action cannot be mitigated, or if the project proponent is unwilling to mitigate them, then the action shall be eliminated from consideration. If it is not possible to identify specific mitigation in the EIS or EA, the lead agency shall identify, at a programmatic level, the types of mitigation that will be required and shall state that the project or other action shall not proceed until a mitigation plan is developed and approved in consultation with other agencies having jurisdiction or management authority over the affected resources."*

25) Recommendation 6.1: Direct CEQ to promote regulations to encourage more consultation with stakeholders. The existing CEQ regulations adequately cover consultation with stakeholders. Formal consultation takes place at the Scoping stage (§1501.7) and during public commenting (§1503). When appropriate, cooperating agency status (§1501.6) establishes additional opportunities for periodic consultation with major stakeholders. Generally speaking, requiring more frequent consultation with stakeholders will create a more complex and protracted NEPA process and more paperwork, which is contrary to the intent of most comments in this report and is unlikely to add materially to the quality of the analysis.

26) Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. There are potential disadvantages in codifying an existing CEQ regulation in NEPA which would make the regulation more difficult to modify. We support the status quo (no change) and oppose amending NEPA itself to encode existing regulations or additional concepts.

27) Recommendation 7.1: Amend NEPA to create a "NEPA Ombudsman" within the Council on Environmental Quality. The purpose of this suggestion is to resolve disputes among stakeholders at the CEQ level rather than at the agency level. This subjugates a fundamental purpose of the NEPA process, which is to define alternatives that address various perspectives of stakeholders regarding an agency decision and analyze the alternatives in comparative form. The resolution of competing philosophies is a function of the analysis. We oppose this suggested change.

28) Recommendation 7.2: Direct CEQ to control NEPA related costs. This provision would charge CEQ with studying NEPA costs and recommending cost ceiling policies to Congress, ostensibly to be codified in statute. Proponents of cost ceilings have not explained how this change will improve the quality of NEPA analyses and decisions, or foster the attainment of national environmental goals. While we do not see a problem with studying NEPA costs and advising on means to control them, we oppose the concept of mandatory cost ceilings. Appropriate NEPA costs vary greatly depending on the project, level of controversy and resources involved. The capability to produce a compliant NEPA document should be the

determining factor, and not be impaired by a potentially unrealistic cost ceiling. Cost ceilings could actually exacerbate overall costs and delays by increasing the potential for litigation. We support studying costs and recommending ways agencies can control them. Much of this is already implicit in CEQ regulations that address length of NEPA documents, time required for preparing NEPA documents, and integrating NEPA with other environmental laws and processes.

29) Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts.

If the "existing condition" perpetually serves as the benchmark for cumulative effects analysis, then the door is opened to permit incremental degradation of the environment on a continuing basis. The incremental effect of the proposed and reasonably foreseeable actions would only be added to the "existing condition," which may evade the finding of a cumulatively significant adverse effect and the need for mitigation. Thus, the existing condition in 10 years could represent a degradation of the current existing condition, and in another 10 years, represents a further degradation. None of this would be captured by the analysis.

The reference point for cumulative effects analysis is intended to be a properly functioning ecosystem, which is generally a time before there were major environmental modifications to the area. Relating cumulative effects to an altered ecosystem (the "existing condition") may evade significance by only considering the incremental impact of the proposed action in relation to the existing condition and not the condition before other past actions affected the area. The change is contrary to national environmental goals and we oppose it.

30) Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate under the cumulative impact analysis. The recommendation is contrary to national environmental goals and we strongly oppose it.

31) Recommendation 9.1: CEQ study of NEPA's interaction with other Federal environmental laws. If the constructs of NEPA and the CEQ regulations are properly read, they are synergistic and complementary to, rather than redundant with other environmental laws and agency authorities. The CEQ regulations provide more than adequate direction to agencies to avoid unnecessary duplication and redundant processes. We support a CEQ study of duplication of regulatory processes only to the extent that it is used to identify cases in which federal agencies are not following direction provided by the existing CEQ regulations. We oppose any attempt to supplant NEPA with other agency authorities and processes, because those processes do not fulfill the purpose and intent of NEPA.

32) CEQ study of current Federal agency NEPA staffing issues. We fully support this recommendation.

33) CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws. We see problems with potentially allowing State environmental processes to supplant NEPA. If other environmental review processes are adequate, agencies are currently directed to reduce duplication and overlap by integrating them into the NEPA process. However, further mandating that agencies allow existing state environmental review processes to satisfy [supplant] NEPA risks forcing agencies to accept deficient analyses and inadequate public review procedures. To assure all NEPA and CEQ provisions are fulfilled, the lead agency should be permitted to integrate relevant and compliant portions of other analyses into the NEPA process, as provided by existing CEQ regulations. We support a CEQ study of duplication of regulatory processes only to the extent that it is used to identify cases in which federal agencies are not following direction provided by the existing CEQ regulations. We oppose any attempt to supplant NEPA with State environmental review processes, because those processes do not fulfill the purpose and intent of NEPA.

Thank you for the opportunity to comment.

Sincerely,

Bill Wichers

BILL WICHERS
DEPUTY DIRECTOR

BW:VS:gbe
cc: USFWS
Temple Stevenson